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IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. 857

PHILIP MARX,

Petitioner,

vs.

LOUIS JAFFE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. _____

PHILIP MARX,

Petitioner,

vs.

LOUIS JAFFE,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of New Jersey

The petitioner, Philip Marx, prays that a Writ of Certiorari issue to review the order of the Supreme Court of New Jersey denying certification to petitioner to review the judgment entered by the Appellate Division of the Superior Court of New Jersey on August 5, 1966.

Opinions Below

The opinion of the trial court entered December 15, 1964 is not officially reported and is printed in the Appendix filed in the court below and is also printed as Appendix A herein. The first Opinion of the Appellate Division, decided

February 23, 1966, remanding case to the trial court to make additional findings of fact, is not officially reported and is printed in the appendix filed in the Court below and is also printed as Appendix B herein.

The second Opinion of the Appellate Division, decided August 5, 1966 is officially reported in 92 N. J. Superior Reports 143,—Atl. Rep. 2—; and is printed herein as Appendix C.

At. Rep. 2d—is printed as Appendix C herein.

The order of the Supreme Court of New Jersey, denying certification, was entered on October 4, 1966 and is not officially printed as yet and is printed as Exhibit E herein.

Jurisdiction

The denial of the petition for certification by the Supreme Court of New Jersey (court of last resort) to review the opinion and judgment of the Appellate Division was entered on October 4, 1966.

The Jurisdiction of this court is invoked pursuant to 28 U. S. Code, Section 1257(3).

Question Presented

May a State court (whose powers have been expressly limited by statute merely to review orders and determinations of an administrative agency) (Milk Control Board) on its own initiative (and in the absence of any proceedings instituted by or before the agency) take primary jurisdiction and declare forfeit a $13,260.00 judgment by reversal, because of an attempted circumvention of a civil penalty statute, over which the agency has by legislative grant, exclusive statutory regulatory and enforcement powers).

a. May it impose a larger penalty than that prescribed by statute?

Constitutional Provisions Involved

United States Constitution

Amendment V.

> "No person shall be deprived of life, liberty or property, without due process of law."

Amendment 14th, Section 1, Clause 3.

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

New Jersey State Constitution

Article III, Par. 1. Branches of Government.

The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in the Constitution.

Article 1. Par. 1.

> "All persons are by nature free and independent and have certain material and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Statute Involved

State Statute involved is New Jersey Statutes Annotated 4:12A-30. It is set out at pages 5-6 of the Statement.

Statement

New Jersey, like some other states, has pursuant to N. J. S. A. 4:12A-1 to 4:12A-58 enacted milk control legislation and has invested the Milk Control Board of the office of Milk Industry of the Department of Agriculture with exclusive powers to fix minimum prices of milk, regulate conditions and terms of sale, hold hearings, and bring suit for penalties for violations of any of the statutes or rules or regulations of its agency in the county or district courts for the benefit of the State and generally given the Director of that Agency broad powers of superintendency over the regulation of the entire milk industry in the state and pursuant to N. J. S. A. 4:12A-8 imposed upon the Director of the agency the duty to enforce the provisions of the statute and pursuant to N. J. S. A. 4:12A.12 specifically limited the Superior Court merely to review orders and determinations of that Director. (See full text of statutes —Appendix F.)

Plaintiff sued defendant in the Superior Court of New Jersey, Law Division, to recover the sum of $13,000.00 loaned to him in July and August 1962, represented by three checks made to his order which he accepted. There was no other written evidence of this loan transaction.

The parties had known each other for some years prior to this loan and at the time of the loan agreement plaintiff was the president of Clinton Milk Co. (hereafter called "Clinton") which was engaged in the sale at wholesale of milk and milk products in the City of Newark, New Jersey.

Defendant on and after July 1, 1962 was associated with U-Neck Super Markets (hereafter called "U-Neck") as an officer, manager and stockholder.

Defendant sought this loan to assist him in financing the prospective operations of U-Neek which plaintiff hoped to secure as a customer for Clinton.

The loans were made directly to the defendant since the plaintiff had more faith in defendant's ultimate ability to repay rather than to a newly organized corporation.

The arrangements for repayment of the loan were that defendant personally assumed ultimate liability for repayment but the loan was to be amortized by means of a credit of 10% to be given defendant on all purchases of milk (price fixed by the Office of Milk Industry) and all other products of Clinton (such as sour cream, buttermilk, etc. not price fixed) thereafter to be made by U-Neek of all of Clinton products.

Thereafter Clinton sold its products to U-Neek until February 1963 when U-Neek made an assignment for the benefit of its creditors at which time Clinton was owed $1,200.00 for goods sold and delivered prior thereto.

Thereafter plaintiff brought suit against defendant to recover the sum of $13,000.00 loaned to him. The defendant contended the loan agreement was made with U-Neek and not with him and was intended as advance rebate on all future purchases to be made by U-Neek of Clinton's products and that this loan agreement and terms of repayment were void and could not be enforced since it was in violation of N. J. S. A. 5:12A-30 which forbids rebates or secret agreements between licensees or other persons whereby the price of milk (price fixed) is reduced (below the minimum established by the Office of Milk Industry) as a result of such agreement or rebates.

The Statute N. J. S. A. 4:12A-30 is herein set out at length.

> "No licensee or other person, association or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual

> or secret agreement, arrangement, combination, contract or common understanding with any other licensee or person, firm or association, or corporation, whereby *the price for milk* to be paid to producers in this State is reduced or the *price* to be paid by dealers, processors, subdealers, stores, or consumers *for such milk is decreased in pursuance of such mutual or secret agreement, arrangement, combination, contract or common understanding* and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall *subject the violator or violators to the penalty in this act prescribed; . . .* " (emphasis supplied)

At the time of the trial it was found that U-Neek had purchased about $10,000.00 worth of Clinton's products to the time U-Neek had made an assignment for the benefit of its creditors and the plaintiff upon disclosure of this fact, the Court, sitting without a jury, gave defendant a credit of $1,000.00 on account of the loan of $13,000.00 and entered a judgment for $13,260.00 in favor of the plaintiff against the defendant (adding interest from date of filing of the complaint), and determined that the loan was made to the defendant and that he personally assumed liability for repayment and found that even if a violation of the statute had occurred the loan agreement was enforceable nevertheless, and that only the Director of the Milk Control Board could bring proceedings to enforce the statutory prescribed penalties, upon proof of violation and that in the posture of the relationship between the parties, this statute had no applicability.

On appeal by the defendant to the Appellate Division of the Superior Court, after the submission of briefs and oral argument, the case was remanded to the trial court to make additional findings of facts, among others, as to whether plaintiff intended to circumvent N. J. S. A. 4:12A-30 in employing the method of repayment by crediting defendant with 10% on all purchases made by U-Neek of Clinton's products, and upon return to the Court of the additional findings of facts, further reserved decision, and requested a copy of the unreported opinion of the case of *Clinton Milk Company* v. *Chuven,* Superior Court, Law Division, Docket L 7359-55 (upon which decision the trial court substantially relied).

The Appellate Division then reversed the judgment entered in favor of the plaintiff in the sum of $13,260.00 and entered judgment in favor of the defendant and disregarded the legislative limitations of its powers to merely review orders and determinations of the Milk Control Board (N. J. S. A. 4:12A-12) and the provision for enforcement of penalty powers delegated exclusively to said agency by the Legislature (N. J. S. A. 4:12A-7 and 8) and held that the loan agreement was in violation of N. J. S. A. 4:12A-30 and was an attempt to circumvent that statute and the plaintiff was therefore barred from recovery because he was in "pari delicto". It disagreed with the trial court's conclusion that only the Director of the Milk Control Board had the power to enforce violations of the statute and held that the Court had similar powers to enforce violations (without any citation of statute or case to support this declaration).

All this, despite the lack of any proper findings of fact by the trial court or the Appellate Division that the plaintiff had actually violated the statute, namely, that the

agreement to amortize the debt by a credit to defendant of 10% on all products purchased by U-Neek of Clinton *decreased* the net price of the milk sold (price-fixed) below the then established minimum prices set by the Office of Milk Industry in July and August 1962, at time loan agreements were made. The Court further declared the loan agreement was so tainted with illegality so as to render it void and unenforceable despite the plain language of the statute (N. J. S. A. 4:12A-30) which provides "that any violation shall subject the violator or violators to the penalty in this act prescribed" (referring to monetary penalties of $50.00 for the first offense, $200.00 for the second offense, revocation or suspension of license or other penalties, the enforcement of which are left exclusively to the Director of the Milk Control Board. See N. J. S. A. 4:12A-39 and 4:12A-44—Appendix F.

Additionally the Court failed to define the term "price" as used in the statute and failed to cite any case to justify its right to usurp the functions of the Milk Control Board or any criminal or civil statute which renders void and unenforceable the loan agreement made betwen the parties. On Petition for Certification to the New Jersey Supreme Court to review the judgment of the Appellate Division, same was denied, without opinion or hearing, despite the allegations in the Petition that the action of the Appellate Division was extra-judicial and void, since it was specifically limited by statute from taking original jurisdiction in any matter, involving any violations of the Milk control statutes, and despite the further fact that the case at bar marked the first instance since the enactment of milk control legislation in New Jersey in 1933 that the Superior Court had taken original jurisdiction of a case involving a charge of violation of the Milk Control statutes, prior to a determination by the Milk Control Board, that a violation had occurred.

Reasons for Granting *Certiorari*

The Petitioner seeks a reversal of the judgment of the Appellate Division entered below, declaring forfeit the $13,260.00 judgment entered in the trial court because:

1. The action of that Court is *coram non judice* since the Superior Court of New Jersey has no primary or original jurisdiction in matters involving the regulation of the milk industry and the enforcement statutes pertaining to that industry because the Court's powers are expressly limited by statute merely to review orders and determinations of the Director of the Milk Control Board.

(a) The usurpation by the Court of the agency's functions and powers constitutes an unlawful encroachment by the judiciary upon the powers of the State legislature and a violation of the triunity powers of government.

(b) The action of the Court being extra-judicial and void constitutes the "taking of property without due process of law" and "the impairment of the obligations of a contract" made between parties in violation of the New Jersey and U. S. Constitutions.

Special Reasons for Certification

The reversal of a judgment in the sum of $13,260.00 entered in the trial court, because of an alleged attempt to circumvent a civil penalty statute which by statute prescribes a fine of $50.00 for the first offense constitutes an anomaly in the law and a gross act of injustice.

POINT I

The Appellate Court's action, by declaring forfeit a $13,260.00 judgment by reversal, was extra-judicial and void and in contravention of both the New Jersey and U. S. Constitutions as well as the New Jersey statutes.

Article III, Par. 1 New Jersey State Constitution provides for the separation of the three branches of government, judicial, legislative and executive and provides that no person belonging to any one branch shall exercise any of the powers properly belonging to either of the others.

The New Jersey State legislature has vested exclusively in the Director of the Milk Control Board of the Office of Milk Industry of the Department of Agriculture board superintendency powers to regulate the entire milk industry in all its operations from the farmer to the consumer level (N. J. S. A. 4:12A-1 to 4:12A-58); to fix prices of milk (minimum), regulate conditions and terms of sale and hold hearings to determine if any violations have occurred of any of the milk control statutes or rules and regulations of the agency, and if after hearings and determinations, a violation has been committed, it is then empowered to bring suit in the county or district court to recover a judgment for the benefit of the State Treasurer, no more than $50.00 for the first offense or $200.00 for the second or subsequent offense, pursuant to N. J. S. A. 4:12A-39 and 4:12A-41 (see full texts—Appendix F) or take other action pursuant to N. J. S. A. 4:12A-44 to restrain habitual violators by court injunction.

See *Abbott's Dairies, Inc.* v. *Armstrong;* 14 N. J. 319, 102 Atl. Rep. 2-272 (Sup. Ct. 1954) and *Burlington Food Stores, Inc.* v. *Hoffman,* 45 N. J. 214, 212 Atl. Rep. 2-29

(Sup. Ct. 1965) for an exposition of the agency's plenary powers.

Not only does the Superior Court lack any legislative grant to entitle it to maintain original jurisdiction in matters involving violations of the milk control statutes but on the contrary, the Legislature has specifically foreclosed it of such power by narrowly restricting its jurisdiction to merely review orders and determinations of the agency. N.J.S.A. 4:12A-12.

It further provided in N.J.S.A. 4:12A-8 that any duly authorized appointee of the Director of Milk Control Board is charged with the duty of enforcement of all of the provisions of the Milk Control Act and in N.J.S.A. 4:12A-7 declared that the board and director are the instrumentalities of the state for the purpose of attaining the ends in this Act declared and the board and director are vested with powers as provided in this act (See full text of statutes, Appendix F). All of which above cited statutes clearly indicate the legislative intention to charge the Director of the Milk Control Board with exclusive powers to enforce the provisions of N.J.S.A. 4:12A-1 to 4:12A-58, including of course 4:12A-30, the statute, *sub judice*.

The question then presents itself:

Was the action of the Appellate Division in declaring forfeit the judgment by reversal of same, proper? The answer must unquestionably be in the negative, since obviously the forfeiture of the judgment was a form of penalty imposed by the Court, albeit an enlargement of the penaalty that could be visited upon the plaintiff upon proof of violation after a hearing and determination was had by the regulatory agency and suit brought by it in the county or district court to recover same pursuant to N.J.S.A. 4:12A-39 and 4:12A-41.

This same answer was furnished by Mr. Justice Harlan in *U. S.* v. *Western Pacific R.R. Co.*, 352 U. S. 63, 64, 77 S. Ct. at p. 165 when he delineated the interrelationship of courts and administrative agencies at p. 165.

> "The doctrine of primary jurisdiction like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone. Judicial interference is withheld until the administrative process has run its course.
>
> "Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body. In such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

In *Cooper* v. *Reynolds*, 77 U. S. Reports (Sup. Ct. 1870) 308, 316, 19 L. Ed. 931, this Court in defining a test of a court's jurisdiction stated:

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought, and this is conferred by the sovereign authority which organizes the courts, and is to be sought for in the general nature of its powers or in the authority specially conferred."

Also in *Vallely* v. *Northern F & M Ins. Co.*, 254 U. S. Reports, 346, 355, 65 L. Ed. 297, 298 (1920) this Court dealt with the limitation of a court's power and stated:

> "Courts are constituted by authority and they cannot go beyond the powers delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable but simply void, and this even prior to reversal."

In determining the scope of the legislative grant given to the Director of the Milk Control Board as indicated by all of the statutes cited above and the express limitations placed upon the Superior Court to merely review orders and determinations of that agency, it is thus apparent that the transaction between the parties herein was uniquely within the competence and sphere of the exclusive delegated powers of the Board since the statute N.J.S.A. 4:12A-30 enjoins "a licensee or other person"—and the regulation of the sale and resale of milk is one of the specific enumerated powers of the Director. See N.J.S.A. 4:12A-21.

It thus follows, *a fortiori*, that the action of the Appellate Division in declaring forfeit a $13,260.00 judgment, was by a court lacking jurisdiction to do so, and constituted a void judicial act (*coram non judice*) and the "taking of property" without due process of law, in violation of the 14th Amendment, Sec. 1, Clause 3, as well as the New Jersey State Constitution, Article III, Par. 1, which creates a triunity of the powers of government and a prohibition against encroachment of one branch by either of the others.

The Court below in its opinion stated "that if the contract be still executory, it will not enforce it and if already executed it will not restore the status *quo ante.*" and added the further general proposition of law "that the law will not assist either party to an illegal contract. The parties being in *pari delicto* it will leave them where it finds them." None of these generalities have any relevancy to the instant case. This general proposition of law (*pari delicto*) may be applicable in the absence of a statute prescribing penalties for the violation of an act, although see *U. S.* v. *Evans,* 333 U. S. 483, post.

But in the instant case, the Legislature has set up a regulatory administrative agency to superintend the entire milk industry. *Abbott's Dairies* v. *Armstrong,* 14 N. J. 319, *supra,* and spelt out the violations for which that agency may bring the violator to task and prescribed with specificity the penalties that may be imposed and designated the courts in which actions to recover penalties may be brought and designated the State Treasurer as the beneficiary of any monetary penalties recovered.

Therefore, the specious doctrine of "*pari delicto*" must yield to the dictates of the statutory scheme of enforcement and to the exclusivity of the administrative forum to enforce them from a consideration of the act as a whole and the specific commands of the Legislature. Otherwise, what security or reliance can be placed in the law, if a Court could on the basis of some specious legal theory frustrate completely a statutory scheme of prescribed penalties; usurp the administrative agency's exclusive statutory enforcement powers and impose a larger penalty than that prescribed by statute (motivated perhaps by its dissatisfaction with the modest prescribed statutory penalties).

This type of judicial action hardly commends itself to "due process of law" and the doctrine of the "separation of the powers of the legislative, judicial and executive."

Had the Legislature intended to nullify any loan obligation involving a conflict with N.J.S.A. 4:12A-30 they could have done so easily by enactment or amendment.

This proposition was succinctly stated by this Court, in *Union National Bank of St. Louis* v. *Missouri,* 97 U. S. 621, 25 L. Ed. 188, 189, 190, in construing a statute:

> "The statute does not declare such security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."

And, at p. 190 citing *Harris* v. *Runnels,* 12 How. 79, this Court further stated that:

> "The statute must be examined as a whole to find out whether or not the makers meant that a contract in contravention of it was to be void so as not to be enforced in a Court of Justice."

So also in *U. S.* v. *Evans,* 333 U. S. 483, 68 S. Ct. 634, 92 L. Ed. 823 (1948) wherein this Court held that where a statute fails to provide a penalty, it is beyond the power of the court to prescribe a penalty.

For all of the above reasons, it is submitted that the action of the Appellate Division in declaring forfeit the judgment of $13,260.00 entered in the trial court was *coram non judice* and violative of both the New Jersey State and United States Constitution as well as the New Jersey statutes.

POINT II

The Appellate Division erroneously concluded without proper proof that plaintiff had violated or attempted to circumvent N.J.S.A. 4:12A-30 and thus its judgment of reversal violated the "due process clause" of the 14th Amendment of the U. S. Constitution.

The trial court found that the loan transaction was not in violation of N.J.S.A. 4:12A-30 which finding was disregarded by the Appellate Division.

What is meant by the word "price" in that statute, which may not be decreased, which the Courts failed to define. A reading of the whole act indicates that it can only mean the minimum prices for milk which the Director is empowered to fix, pursuant to N. J. S. A. 4:12A-22. It was therefore most pertinent for the trial court and the Appellate Division (despite their lack of statutory authority to make any findings of any violations or enforce violations for the reasons set out in Point I, *supra*) to determine what the established minimum price of milk was in July and August 1962, once having opened up this avenue, and what the sale price of the milk was agreed upon between Clinton and U-Neek before any determination could be made if a violation had occurred of the statute or any circumvention of it.

It well could be that if the parties agreed that Clinton was to sell its milk (price fixed) to U-Neek for example at a price of 24¢ per quart, then despite a discount of 10% on such price (if the then established minimum price was 20¢ per quart), the net selling price would be 21.6¢ per quart, above the established minimum and beyond the interdiction of the statute.

The record is utterly barren of any evidence of the established minimum price or the sale price agreed between the parties at all times that Clinton dealt with U-Neek or at the times the loan agreements were made.

Absent this critical evidence neither court or even the administrative agency could find whether any violation of the statute has occurred or whether any circumvention of the statute was intended by the agreed method of amortization of the loan.

Should this Court then take jurisdiction of the case at bar when the State court failed to make these findings of material facts?

This Court in invoking jurisdiction of a state court decision, in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 703, 65 Sup. Ct. Reporter, 895 stated:

> "The state courts made no findings of facts on this issue. Where a state court fails to pass on evidence or makes findings of facts because under their respective views the facts referred to are immaterial, we are not relieved from the duty of examiinng the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court."

Further, in *Southwestern T & T Co.* v. *Danaher*, 238 U. S. 485, 591, 59 L. Ed. 1419, this Court in reviewing a state court decision penalizing the plaintiff utility $6,300.00 for its refusal to give service to a customer who had prior thereto failed to pay her past due bill, stated (statute provides $100. per day fine for each day's failure to render service):

> "In these circumstances to inflict upon the company penalties aggregating $6,300.00 was so plainly arbi-

trary and oppressive as to be nothing short of taking of its property without due process of law."

So, too, with like effect, *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 484, 491, 59 L. Ed. 1422 (S. Ct. 1914), involving excessive penalties imposed by the State upon a common carrier.

In the case at bar, the statutory prescribed penalty is $50.00 for the first offense and the reversal of the judgment of $13,260.00 constitutes an arbitrary confiscation of plaintiff's property and a taking of property "without due process of law by the Court".

Additionally, the characterization of plaintiff's conduct and innuendoes derived therefrom, as a substitute for proof, as displayed by the Appellate Division's Opinion has no place in any judicial opinion.

The novel concept advanced by the Court below in declaring forfeit a $13,260.00 judgment because it concluded (without any proper proofs thereof) that the parties intended to circumvent a civil penalty statute which prescribes a penalty of $50.00 for the the first offense and other statutorily prescribed penalties (none of which compel declaring null and void a loan obligation between parties)—penalties which can only be imposed after hearings and determinations by the administrative agency, is evidence of the Court's flagrant disregard of the fundamental rules of proof and its own statutory limitations and a flouting of traditional rules of evidence of American Jurisprudence, rules, which we, in this nation, regard as safeguards of judicial proceedings and in which we take just pride.

CONCLUSION

For all of the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS ASARNOW,
Counsel for Petitioner.

[APPENDICES FOLLOW]